88-1959

No.

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN A. HELLER and JERROLD L. MORRIS,

Petitioners,

vs.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Does the Ex Post Facto Clause apply to a new interpretation of a rule announced by a court, when the court acts in a legislative capacity in promulgating the new interpretation in a state attorney disciplinary code?

2. Does the Ex Post Facto Clause apply to the quasi-criminal penalty of disbarment?

3. Even if the Ex Post Facto clause is not directly applicable, do the due process principles enunciated by this Court in Bouie v. City of Columbia, 378 U.S. 347 (1964), and its progeny, preclude the retroactive application of new and unforseeable judicial construction of disciplinary rules?

4. Does the procedure whereby an attorney is granted immunity from criminal prosecution and required to give testimony which is later used to deprive him of his law license violate the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners Melvin A. Heller and Jerrold L. Morris were respondents before the Supreme Court of Illinois. Respondent before this Court, the Illinois Attorney Registration and Disciplinary Commission,

was petitioner below and commenced the disciplinary proceeding against Heller and Morris.

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IN THE
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MELVIN A. HELLER,

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-Vs-

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PRAYER

Petitioners Melvin A. Heller and Jerrold L. Morris respectfully pray that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of Illinois entered in this cause on December 6, 1988.

OPINIONS BELOW

The opinion of the Illinois Supreme court is reported at 126 Ill.2d 824, 533 N.E.2d 94 (1988), and is attached hereto in the Appendix at A1.

JURISDICTION

On September 6, 1988, the Illinois Supreme Court entered an order disbarring petitioners from the practice of law. Petitioners filed a timely petition for rehearing in the Illinois Supreme Court. On January 30, 1989, the Illinois Supreme Court denied the petition for rehearing. App. at A11. On A April 24, 1989, Justice Stevens entered an Order extending the time in which to file a petition for certiorari to and including May 30, 1989. App. at A34. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, §10 OF THE CONSTITUTION OF THE UNITED STATES, in pertinent part, states:

> No State shall . . . pass any . . . ex post facto law.

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES, in pertinent part, states:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATE RULES INVOLVED

At the time of the conduct in question, the Illinois Supreme Court had not yet adopted its Code of Professional Responsibility, but had stated in its opinions that the Code adopted by the Illinois State Bar Association was one by which attorneys could guide their conduct. Rule 7-110(A) of that Code provided:

> A lawyer shall not give or lend anything of value to a judge, official or employee of a tribunal.

The Illinois Code of Professional Responsibility, and specifically Disciplinary Rule 7-110(a), 107 Ill.2d R.7-110(a), promulgated in 1980, provided:

> A lawyer shall not give or lend anything of value to a judge, official or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

As amended in 1988 and as applied to petitioners in the decision below, Disciplinary Rule 7-110(a) provides:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign

> fund of a candidate for such office.

Rule 65(C)(4) of the Code of Judicial Conduct, incorporated by reference in amended Disciplinary Rule 7-110(a), was added in 1987, after the conduct at issue here. It provides:

> Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except as follows:
>
> (a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.
>
> (b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a bequest, favor, or loan from a relative; a wedding or engagement

gift * * *;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan, only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

STATEMENT OF THE CASE

This case involves the disbarment of petitioners, Melvin A. Heller and Jerrold L. Morris, from the practice of law in the State of Illinois.

Melvin A. Heller

Heller was admitted to practice law in the State of Illinois in November, 1950. (R. 95).* In 1958, he formed a partnership with Morris. (R. 15, 147). The firm became

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*References to "R. " are to the Transcript of Proceedings before the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission.

a professional corporation in 1978 (R. 16), and ultimately grew to include five or six associates. (R. 17) The primary area of concentration of the firm has been in plaintiffs' personal injury work. (R. 16).

Heller has been primarily responsible for the internal matters of the office (R. 154) and is the administrator of the office. (R. 142).

Heller has shared in the majority of the pro bono work in the office since he makes initial contact with potential clients. (R. 51). It has been the firm's practice to spend some time with each potential client even if the firm could not take the case, and to give persons free legal advice and direct them to where they could get help. (R. 138).

Heller was a founding member of A.G.

Beth Israel, a synagogue on the North Side of Chicago. He is also very involved in the Women's American ORT, which is an organization that establishes technical schools throughout the world to educate underprivileged youth. (R. 151-152).

Heller also contributes to DePaul University, is a member of DePaul's President's Club and Society of Fellows, and has received letters of commendation in that regard. (R. 152). Heller has served on or belonged to various bar associations, including serving on the Board of Managers of the Illinois Trial Lawyers Association. (R. 152-153).

Numerous individuals attested to Heller's character for truthfulness and honesty. A reporter for the Chicago Tribune, who is also licensed to practice law,

testified he knew Heller for fifteen years, and that Heller's reputation for honesty and trustworthiness in the legal community is excellent. (R. 80-82).

A businessman, who has known Heller for over 20 years, testified that Heller is a friend, has represented him and his son, and that Heller is above-board and always truthful. (R. 84-86).

An active member of Women's American ORT testified to Heller's generosity toward that organization and to his good reputation for truth and honesty in the community. (Evid. Dep. of Corn, 5-6).

An attorney, whose principal occupation is as a claims attorney for Allstate Insurance Company, testified that he has known Heller for approximately 18 years, primarily in an "adversarial relationship in the

negotiation of claims." He has always found Heller forthright, truthful and honest. (Evid. Dep. of Catalani, 4-5, 7).

Three additional witnesses testified to the excellent reputation of both petitioners. Henry Mikolojczyk, a registered architect and consultant, whom petitioners have used as a consultant or expert four or five times a year, testified that in his opinion and in the opinion of the legal community both Heller and Morris have excellent reputations. (R. 87-89). Nat P. Ozmon, a respected attorney, stated that he had known petitioners for 30 years, and their reputations in the legal community are very good. (R. 112-14). Lastly, Leonard Ring, another respected attorney, stated he had known petitioners 25 to 30 years, as they have offices in the same building, and he per-

sonally considered their reputations as those of men who are deserving of trust and confidence. (Tr. 127-129).

Heller had known Judge Reginald Holzer ("Holzer") for thirty years. (R. 96). The Heller and Holzer families lived in the same Chicago suburb and their children went to grammar school and high school together. Both families attended social functions together. (R. 148-150).

As Heller had no involvement with the actual litigation of cases for the firm (R. 101), he never personally appeared before Holzer. Morris made the decision to pre-try some of the firm's cases before Holzer and then informed Heller about it. (R. 97).

When an indictment was returned against Holzer in the Operation Greylord investigation of the Cook County court system, Heller

cooperated with the government and received immunity, although he was not called to testify at Holzer's trial. (R. 104). Heller also cooperated completely with the Administrator of the Illinois Attorney Registration and Disciplinary Commission ("A.R.D.C.") in the subsequent disciplinary proceedings against him and Morris.

Jerrold L. Morris

Morris was admitted to practice law in the State of Illinois in 1952.

In 1958, Heller approached Morris and asked him to form a partnership. (R. 126). Thereafter, Morris' responsibilities in the two partners' firm has centered on the litigation of cases. (R. 126).

Morris has been very active in fundraising for his temple--Temple Shalom. (R. 134). Additionally, because of the

nature of his practice, he has spent much time giving free legal advice. (R. 138). Morris also volunteered for pro bono work with the Chicago Bar Association. (R. 138). He is a past president of a local B'Nai B'Rith chapter and in the past has been named "Man of the Year" by B'Nai B'Rith. He has donated to the Jewish United Fund, and he and his wife are active in the Easter Seal, the Kidney Foundation and the Cerebral Palsy fund drives. His grandson suffers from spinal bifida, so he has a special interest in that disease. (R.139-140).

Besides Henry Mikolojczyk, Nat Ozman, and Leonard Ring, who attested to Morris' reputation for truthfulness and honesty, and whose testimony is described above, three other character witnesses presented testimony on Morris' behalf.

Dr. David Fisher, a physician and surgeon, stated he had known Morris for thirty-two years. Dr. Fisher has two sons who are lawyers and he has a great deal of contact with lawyers. He testified that every time Morris' name has come up in conversation only good things are said about him. (R. 75-78).

Gerson Field, an attorney, who has known Morris since they were children, tesitifed that Morris has a fine reputation for truthfulness, honesty and good character. (R. 91-94).

Lastly, Stanley Block, an attorney with Vedder, Price, Kaufman and Kammholz, testified that he had known Morris for six years and that Morris' reputation in the legal community for truthfulness and honesty is excellent. (R. 108-110).

Morris had known Holzer for 40 years. They met in law school and developed a warm, confidential relationship, although they did not socialize together. (R. 21). Morris became aware during the 1960's that Holzer had become a Circuit Court judge. (R. 22).

In the early 1970's, Morris learned that attorneys were permitted to pre-try a "block" of their cases in the Law Division of the Circuit Court of Cook County if there were a judge who agreed to do this. (R. 27). The benefit of these block assignments for pre-trial of cases was that the cases could be settled and removed from the court-call. (R. 27-28). Holzer was assigned to the Law Division and Morris decided to talk to Holzer about such a block assignment. (R. 28).

He first verified the procedure with

the Assignment Judge's clerk and gave him a copy of his case list. He then brought a copy of the list to Holzer and told him that the Assignment Judge would allow Holzer to pre-try all the cases if Holzer approved. Holzer agreed. (R. 29).

When Morris was contacted by the Federal Bureau Investigation about the Holzer investigation, he cooperated with the Government and received a grant of immunity. At the time that he testifed, he realized that the immunity grant did not cover any prosecution by the A.R.D.C.'s Administrator for unethical conduct. (R. 141). When contacted by the Administrator, Morris cooperated with the investigation.

THE FIRST LOAN TRANSACTION

In January of 1972, Holzer asked Morris to come to his chambers. (R. 30).

After initial conversation about family and other matters, Holzer started talking about his desperate need for between $5,000 to $10,000. (R. 31).

Morris explained to Holzer that he could not help him but he would try to get someone to loan Holzer the money. (R. 32).

As Morris walked back to his office he knew he could not loan Holzer money, yet the firm had numerous cases before Holzer and a lot of clients to worry about. It seemed impossible to get a change of venue for all the cases. Also, Holzer was a confidant and friend and both Heller and Morris had known him for many years. (R. 33-34). It seemed, by the way Holzer was speaking, that he could scarcely pay rent or put food on the table. Morris felt he should help Holzer. (R. 35).

Morris told Heller that Holzer had asked him to find someone who could loan Holzer money. Heller agreed that they should help Holzer, as he was a friend and the two had a duty to help him. Morris came to the conclusion that he would help Holzer in such a way that Holzer would never know that it was Morris personally helping him. Morris decided to ask his uncle by marriage to loan Holzer the money. The uncle wrote out a check for $3,500, and Morris and Heller gave him $3,500, to ensure that he would not lose anything. Morris delivered the check to Holzer. (R. 32-38).

Morris explained to Holzer that it was very important that Holzer repay the uncle with interest. Holzer assured Morris this would be done. (R. 38). Holzer signed a promissory note to the uncle. (R. 38-39).

Morris brought the note back to the uncle, who endorsed it on the back. Morris assured the uncle that any interest given by Holzer would be his. Morris then placed the endorsed note in a safe in his office. (R. 40).

Between this transaction and the September 1973 meeting discussed below, Morris attended pre-trials before Holzer. (R. 43).

SECOND LOAN TRANSACTION

In September, 1973, Holzer again summoned Morris to his chambers. Holzer again said he was in deep financial trouble. Morris reminded Holzer that he still had not repaid the previous loan, nor any of the interest, so it would be difficult to get another loan from the uncle. Holzer gave Morris his check for the interest due, payable to the uncle. (R.

42-46).

Morris then went back to his office and explained the situation to Heller. Morris told Heller that things sounded really bad for Holzer. They both agreed to help Holzer again. (R. 47).

Again Morris' uncle wrote a check payable to Holzer, for $5,000. Morris and Heller reimbursed the uncle for the $5,000, gave Holzer's interest check for $411.20 to him. (R. 48-50).

Morris took Sidel's check for $5,000 to Holzer. Morris told Holzer that he must sign a new note, pay the old loan as well as the new, with interest on both loans, when the second note was due. (R. 48-50).

Morris took the note back to the office, had the uncle endorse it, placed the note in an envelope with the previous note

and put it in his safe. (R. 51). Holzer never paid any additional interest on either of the notes, nor did Holzer pay any principal on either of the notes. (R. 52).

Morris never asked Holzer for the money because he was too embarrassed to ask his friend, who appeared to be in deep financial trouble. Holzer kept repeating, every time Morris saw him, that he was still trying to play catch-up and still had financial trouble. (R. 52-53). After the first loan to Holzer, Morris tried a jury trial before Holzer and attained a $16,000 verdict favorable to his side. (R. 53). Additionally, Morris settled another case during a pre-trial before Holzer. (R. 54). Morris also recalled two directed verdicts and a summary judgment against his clients by Holzer. (R. 55). Morris could not recall any

additional cases he personally had before Holzer, and stated that there were not many cases tried by his associates before Holzer. (R. 56).

THIRD LOAN TRANSACTION

Holzer again called Morris into his chambers in late 1976. Holzer still needed financial help, and Morris told Holzer that there was no one he knew that could help because Holzer had not paid the previous loan. (R. 58). Holzer suggested that since Morris knew people at a bank, perhaps he could call them up and see if they would give Holzer a loan. (R. 58).

Morris testifed that he called the president of the bank and asked him if the bank could loan Holzer money. The bank agreed as long as a guarantor could be had. (R. 59-60). Because Morris and Heller did

not want Holzer to know that they were helping him, they asked a friend, promising to reimburse him if he lost anything. (R. 60). The loan was then made.

FOURTH AND FIFTH LOAN TRANSACTIONS

In August, 1978, Holzer asked Morris if he could help him again at the bank with a $10,000 loan. Morris did not know if this was a partial renewal of the previous loan. The bank required a guarantor. Morris and Heller executed a guarantee for this $10,000. (R. 66-68).

In December, 1979, Morris received a letter from the bank, asking if Heller and Morris would sign another guarantee for $10,000. They did so. Morris again, did not know whether the second $10,000 guarantee was a renewal of the previous $10,000 loan. (R. 68).

On September 5, 1986, the Administrator of the A.R.D.C. filed a complaint against Heller and Morris, alleging various violations of the Illinois Code of Professional Responsibility in connection with the loan transactions, primarily Rule 7-110(a) which prohibits lending or giving a thing of value to a judicial officer. (107 Ill.2d R. 7-110(a)).

On December 22, 1986, a hearing was conducted, and on February 24, 1987, the panel of the Hearing Board which heard the case recommended that both petitioners be disbarred for their conduct.

Petitioners filed exceptions with the Review Board, the next level of the Illinois disciplinary system.

In its Report and Recommendation the Review Board also recommended disbarment for

both petitioners.

The Illinois Supreme Court agreed with the reports of both the Hearing and Review Boards that the appropriate sanction in this case was disbarment for each petitioner, finding that they had violated Rule 7-110(a). In reaching this finding the court held that it was not necessary to determine what Holzer knew about the loans arranged by petitioners, contrary to petitioner's claim that relevant to the determination of any violation of Rule 7-110(a) was the question of whether they had sought or received favorable treatment from Holzer in return for securing the loans. In re Heller, 126 Ill.2d 824, 828 (1988). App. at A7. The court then applied the interpretation of Rule 7-110(a) which it had recently announced in In re Corboy, 124 Ill.2d 29,

528 N.E.2d 694 (1988), the first time the court had considered the rule.

The court stated, citing Corboy, that "eleemosynary motives * * * are irrelevant" as to an alleged violation of Rule 7-110(a), that evidence of dishonest intent is not necessary to justify the imposition of discipline, and that such evidence is usually only appropriate to determine the nature and severity of the sanction imposed. Heller, supra, 126 Ill.2d at 830. App. at A10. The court then levied the ultimate available sanction upon petitioners, disbarring them from the practice of law.

Petitioners filed a timely petition for rehearing, objecting to, inter alia, the application to them of the ultimate sanction of disbarment where the court had only recently clarified the application of Rule

7-110(a) in its opinion in Corboy. Petitioners also objected to the constitutionality of the procedure whereby petitioners were granted immunity from criminal prosecution and in return required to give their testimony at the trial of Holzer, where the information contained in that testimony was later used to deprive them of their law licenses. The court below denied rehearing.

REASONS FOR GRANTING THE WRIT

Petitioners' federal constitutional claims concern the unforeseen and unforeseeable retroactive application to them of a new interpretation and construction of a disciplinary rule first promulgated by the Supreme Court of Illinois in its opinion in a case decided after the conduct for which disciplinary action is being taken against

petitioners occurred, whereby the court found that petitioners conduct warranted disbarment for their violations of the rule. Petitioners' claims also address the violation of their due process rights by a procedure by which they were granted immunity from criminal prosecution and required to give statements and testimony in connection with a third party's criminal trial, and their testimony was subsequently used in a disciplinary proceeding against petitioners to deprive them of their law licenses.

Recognizing that the bar was "without the guidance of precedent or opinion," the Illinois Supreme Court, in its decision in In re Corboy, 124 Ill.2d 38, 528 N.E.2d 694 (1988), took the opportunity to clarify for the Illinois Bar Disciplinary Rule 7-110(a) of the Illinois Code of Professional Respon-

sibility, which, prior to the decision in Corboy, provided:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

(107 Ill.2d R. 7-110(a)). In Corboy, disciplinary proceedings were brought against six attorneys who had written checks to a judge whose family the attorneys had known for long periods of time, for the purpose of paying the judge's mother's hospital bills. Although the checks were payable to the judge, all the attorneys had considered the funds to be a loan to the mother. Questions presented for the court in Corboy involved what constituted "giving or lending a thing of value to a judge" within the meaning of the rule, and whether there was a violation

of the rule where the attorneys' intent was charitable and not directed at seeking any beneficial treatment or advantage in the future from the judge.

The Administrator of the Illinois Attorney Registration and Disciplinary Commission argued that a per se interpretation of Rule 7-110(a) was appropriate, while the respondent attorneys in Corboy took the position, then shared by members of the bar, that some dishonest intent or motive was required to be proved before a violation of the rule could be established or discipline imposed. The court partially settled the issue as it pertained to Rule 7-110(a) when it stated in Corboy that evidence of a lack of dishonest intent is usually only appropriate in determining the nature and severity of the sanction to be imposed.

In addition, the court, in Corboy, chose to incorporate Rule 65(C)(4) of the Illinois Code of Judicial Conduct (107 Ill.2d Rule 65(C)(4)), into Rule 7-110(a). Rule 65(C) permits a judge or relative of a judge to accept a gift or loan from a lawyer under specific circumstances. These petitioners do not claim that their conduct falls under those circumstances.

The sanction levied against petitioners in the instant case is the severest possible --disbarment. In a previous opinion the Illinois Supreme Court had cautioned that the imposition of disbarment was to be exercised with great care:

> The punishment to be inflicted by disbarment of an attorney is the destruction of his professional life. Only clear and satisfactory proof can justify a decision from which would flow consequences

> of such a grave nature. (Citations omitted). To justify disbarment the case made must be free of doubt, not only as to the act charged but as to the motive with which it was done. (Citations omitted). There are other authorities supporting these propositions but we do not deem it necessary to cite them. The evidence of the guilt of the accused with reference to the transactions charged must be clear, and it is not sufficient that the evidence shows a state of facts not entirely creditable to the respondent and the other parties to the transaction.

In re Donaghy, 402 Ill. 120, 83 N.E.2d 560, 567 (1948) (emphasis supplied). A dishonest intent or motive was therefore one of the facts which had to be established before an attorney could be disbarred.

In finding that disbarment was appropriate in these petitioners' case, the court in its opinion stated,

> While our court has only recently addressed the issue of loans or gifts to judges under Rule 7-110, as we noted in In re Corboy [cite omitted], "eleemosynary motives * * * are irrelevant."

Heller, 126 Ill.2d at 830; App. at A10. Thus, after construing Rule 7-110(a) for the first time so as to read out any state of mind requirement, the court then also ignored its own admonition in Donoghy as to the motive requirement in imposing disbarment in order to find that disbarment was now warranted on the facts of their case.

I. This Court Should Resolve The Recurring Question Of Whether The Ex Post Facto Clause Applies To The Legislative Acts Of A Court When Acting In Its Capacity In Promulgating Disciplinary Rules Regulating The Practice Of Law.

This Court should resolve the question

of whether the Ex Post Facto clause and its protections applies to disbarment proceedings and whether, accordingly, the Illinois Supreme Court's decision to disbar petitioners was violative of their Due Process rights.

The court's action contravened the express prohibition in Article I, Section 10 of the United States Constitution that "[n]o state shall * * * pass any * * * Ex Post Facto Law." That clause is fully applicable here because the court below exercised its legislative powers in promulgating an interpretation of the rule it then applied retroactively to petitioners, and because the disbarment of an attorney is analogous to a criminal proceeding for purposes of the Ex Post Facto Clause. The court's action also violated the Due Process Clause of the

Fourteenth Amendment, which prohibits the imposition of punitive sanctions on the basis of a retroactive judicial construction enlarging the scope of prohibited conduct.

It is clear that when the court below announced its interpretation of the rule in Corboy it was acting in a legislative capacity. That court recently reaffirmed that it has the "sole authority to regulate and discipline attorney conduct" and "possesses the inherent and exclusive power to regulate the practice of law in this state." People ex rel. Brazen v. Finley, 119 Ill.2d 485, 492-93, 519 N.E.2d 898 (1988). Brazen concerned the attempted exercise of rulemaking power by a lower court, but it relied upon and reaffirmed the earlier decision of In re Day, 181 Ill. 73, 54 N.E.646 (1899), in which the Court expressly held that the

power to regulate the bar rested with the state supreme court, and not the legislature.

This Court has also expressly held that state courts exercise legislative rather than adjudicatory powers in promulgating disciplinary rules. In Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), this Court ruled that the Virginia Supreme Court and its Chief Justice were entitled to immunity as legislators in a suit challenging their promulgation of particular provisions of the Virginia Code of Professional Responsibility. This Court noted that "propounding the Code was not an act of adjudication but one of rulemaking," id. at 731, and that disciplinary rules

> are rules of general application and are statutory in character. They act not on

> parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature. [Id., quoting 470 F. Supp. 1055, 1064 (E.D. Va. 1979) (Warriner, J., dissenting).]

This Court held that the members of the state court "are state legislators for the purpose of issuing the Bar Code," and should enjoy the immunity of legislators. Consumers Union, supra, 446 U.S. at 734.

As to whether the Ex-Post Facto Clause applies specifically to the quasi-criminal context of disbarment proceedings, this Court has recognized that such proceedings are not typical civil actions (in which this Court has held that the clause does not

apply), but rather "adversary proceedings of a quasi-criminal nature," and that disbarment, although it may be intended to protect the public, "is a punishment or penalty imposed on the lawyer." In re Ruffalo, 390 U.S. 544 (1968).

The circuits have had considerable difficulty in categorizing disbarment proceedings, and have adopted several different, conflicting formulations. The District of Columbia, Fifth and Eighth Circuits have recognized that such proceedings are quasi-criminal in nature*, while the Third,

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*In re Thalheim, 853 F.2d 383, 388 (5th Cir. 1988) ("attorney disbarment and suspension cases are quasi-criminal in character"); Charlton v. FTC, 543 F.2d 903, 906 (D.C. Cir. 1976) ("disciplinary proceedings 'are adversary proceedings of quasi-criminal nature'")(quoting In re Ruffalo, 390 U.S. at 551); Goodrich v. Supreme Court of South Dakota, 511 F.2d 316, 318 n.4 (8th Cir. 1974) ("State disbarment proceedings are * * * quasi-criminal in nature")

Seventh, and Ninth Circuits have simply ruled that they are neither criminal nor civil.** The Second Circuit has held that a "court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding," since "for most attorneys the license to practice law represents their livlihood, the loss of which may be greater punishment than a monetary fine." Erdmann

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**In re Ross, 735 F.2d 1168, 1170 (9th Cir. 1984)("nature of a disciplinary proceeding is neither civil nor criminal"); In re Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975)("Although a disbarment proceeding is not criminal in nature, it has consequences which remove it from ordinary run of civil case"); In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970) ("disbarment and suspension proceedings are neither civil nor criminal in nature"). The Supreme Court of Illinois, citing In re Echeles, has stated that Illinois disciplinary proceedings are sui generis," neither civil nor criminal in nature." In re Mitan, 119 Ill.2d 229, 245-46, 518 N.E.2d 1000, 1008, 1987.

v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir. 1972).

Presumably because disbarment proceedings are not technically criminal adjudications, many courts have held that the Ex Post Facto Clause is not applicable.* At the same time, however, other courts have been unwilling to permit the severe sanction of the loss of livelihood to be imposed retroactively for conduct that was not barred when it took place. They have accordingly

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*See, e.g., In the Matter of Randall, 640 F.2d 898, 905 (8th Cir. 1981) ("the ex post facto clause and concept is only applicable in criminal cases"); In the Matter of Leifer, 407 N.Y.S.2d 1 (A.D.2d 1978) (same); Nicholson v. Judicial Retirement and Removal Comm'n, 562 S.W.2d 306 (Ky. 1978) (same); In re Inquiry Concerning a Judge, 357 So.2d 172 (Fla. 1978); cf. Arthur v. Board of Regents, 418 N.E.2d 1236 (Mass. 1981) (physician disciplinary proceedings fall outside the scope of the ex post facto doctrine).

applied the principles of the Ex Post Facto Clause to disbarment proceedings through the Due Process Clause.

To cite a very recent example, in Sexton v. Supreme Court Committee on Professional Conduct, 474 S.W.2d 94 (Ark. 1988), an attorney was charged with violating a rule of professional conduct that was not in existence at the time of his improper conduct. The Supreme Court of Arkansas concluded that "[d]ue process requires notice that an act is punishable at the time it is committed." Id. at 96. There was no suggestion that the attorney's conduct was not improper prior to the adoption of the new rule, and in fact the court conceded that "Sexton should have been charged under the rule in effect at the time of his conduct." Id. Nonetheless, his conduct could

not be examined retroactively under a rule that was not in effect at the time of the conduct.

Another case similar to the one at bar dismissed an ex post facto challenge to the removal of a judge, but then invoked ex post facto principles under the rubric of due process to bar the retroactive application of a new rule of judicial conduct. In In re Inquiry Concerning A Judge, 357 So.2d 172 (Fla. 1978), a judge being disciplined was accused of various acts of judicial misconduct. At the time of his conduct, the rule in Florida was that a judge could not be removed from office unless he was guilty of misconduct and "he committed it with a corrupt motive." 357 So.2d at 180. After the conduct at issue, however, the rule was amended to delete any requirement of a

corrupt motive -- much as the Illinois Supreme Court in Corboy amended the rule at issue in this case to delete any intent requirement. The judge being disciplined asserted that the record reflected that he had been sincerely attempting to carry out his duties and had not been motivated by any desire for personal advancement, that he therefore had not violated the rule in effect at the time, and that the new rule could not be retroactively applied to him.

The Florida court ruled that the Ex Post Facto Clause was not applicable, because it only applied to criminal cases. Id. at 180. The court nonetheless held that applying the new rule to the judge would violate due process:

> Any other conclusion would expose judicial officers to the unfair and untenable situation in which even innocent acts of

> today could someday be declared improper and subject them to punishment or removal from office. * * * Judicial officers are justified in relying on the current rule and in conducting themselves accordingly. [Id. at 181.]

This is, of course, quite simply the application of the Ex Post Facto Clause under another name. Petitioners below relied upon both the Ex Post Facto Clause and the Due Process Clause of the Federal Constitution in protesting the retroactive application of the new rule announced in Corboy. While some courts do not apply the Ex Post Facto Clause to disbarment proceedings because they are not, strictly speaking, criminal adjudications, others recognize the unfairness of such an approach and apply the same principles under due process.

This Court itself recently emphasized the importance of prior notice that conduct

is prohibited before that conduct can form the basis for disbarment as opposed to other, lesser sanctions. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Court noted the vagueness in a bar advertising rule, but found "no infirmity" in a decision to issue a public reprimand to an attorney for violating the rule. Id. at 653-654 n.15. At the same time, however, the Court stressed that "[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed," and that "it may well be" that disbarring an attorney for the same violation "would raise significant due process concerns." 471 U.S. at 653 n.15.

This Court should recognize the tension that has arisen from the strict limitation of the Ex Post Facto Clause to criminal cases and the judicial efforts to avoid patently unjust results caused by that limitation, and grant the Writ to clarify the extent to which the Ex Post Facto clause applies to disbarment proceedings.

II. This Court Should Reconfirm That Due Process Prohibits Unforeseeable Judicial Expansion Of Punitive Provisions.

Even if this Court should determine that the Ex Post Facto Clause is not directly applicable, it should grant the writ to reconfirm its prior holdings that the Due Process Clause of the Fourteenth Amendment precludes the retroactive application of an unforeseeable judicial

expansion of punitive provisions. An individual may not -- consistent with due process -- be punished for conduct that was not prohibited when it occurred. Nor should attorneys suffer the ultimate disciplinary sanction based on an interpretation of a rule not previously promulgated. When courts unforeseeably expand rules to embrace conduct not previously covered, due process forbids the retroactive application of the new interpretation.

This Court first articulated the principle in Bouie v. City of Columbia, 376 U.S. 347 (1964), a case challenging the trespass convictions of civil rights demonstrators following a sit-in. Although the trespass statute by its terms prohibited only unpermitted entry, the South Carolina Supreme Court had affirmed the demonstra-

tors' convictions on the basis of a novel statutory interpretation that extended the prohibition to the act of remaining on premises after notice to leave. This Court reversed, concluding that this construction was too unexpected to provide the individuals fair warning that their conduct violated the law.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. * * * Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. [378 U.S. at 352-354.]

According to the Court, due process barred "retroactive criminal prohibitions emanating

from courts as well as legislatures." Id. at 354.

The principle of Bouie applies not only to narrow statutory language that is given an unforeseeably expansive interpretation, but also to broad statutory language that is applied in an unforeseeable manner, even if the application is technically within the scope of the broad language. In Douglas v. Buder, 412 U.S. 430 (1973), for example, this Court considered a state law that required probationers to report any arrests or face revocation of their probation. The probationer failed to report a traffic citation, and the state attempted to revoke his probation. The state courts upheld revocation, construing "arrest" to include the receipt of a traffic citation. This Court reversed, ruling that "the unforeseeable

application of [the state court's] interpretation in the case before us deprived petitioner of due process." Id. at 432. The Court specifically noted that "no prior * * * decisional law" supported the contention that a traffic citation could be considered an arrest.

This reasoning is directly applicable here. Although the disciplinary rule appeared to prohibit any gift or loan, just as the statute in Douglas appeared to require the report of any arrest, it was not understood to apply to gifts or loans not intended to influence decisions, just as "all arrests" in Douglas was not understood to apply to traffic citations. Just as the unforeseeable application of the facially broad language in Douglas could not be retroactively applied, so too here the un-

foreseeable construction of the disciplinary rule in Corboy cannot be retroactively applied, despite the facially broad language of the prior rule.

Significantly, this Court in Douglas applied the Bouie analysis to a probation revocation proceeding, even though such proceedings are not criminal trials. (See Prellwitz v. Berg, 578 F.2d 190, 192 (7th Cir. 1978); People v. Butler, 137 Ill.App.3d 704, 484 N.E.2d 921, 927 (1985) ("A probation revocation hearing is not a criminal adjudication")). The protections enunciated in Bouie are thus fully applicable regardless of the characterization of a disbarment proceeding.

The concern about fair notice underlying both the Ex Post Facto Clause and the Bouie principle ~~is~~ especially implicated by

facially broad language subject to unforeseeable judicial construction. Marks v. United States, 430 U.S. 188 (1977), involved an obscenity statute drafted in "sweeping language" which had been narrowed by judicial gloss and then broadened by a later interpretation. This Court declined to permit retroactive application of the broader construction, noting that the "fair warning" principle underlying the Ex Post Facto Clause was "fundamental to our concept of constitutional liberty" and "[a]s such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." 430 U.S. at 191-192 (emphasis supplied).

Indeed, the Courts of Appeals have viewed Bouie broadly, as applying the Ex Post Facto Clause to judicial decisions un-

der the rubric of due process. As one court has noted, "[a]lthough the ex post facto prohibition * * * literally applies only to legislative acts, the Supreme Court has incorporated the principle upon which the prohibition rests into the due process clause of the Fifth and Fourteenth Amendments." Knapp v. Cardwell, 667 F.2d 1253, 1262 (9th Cir. 1982).

This Court should recognize the conflict between the principle of Bouie and its progeny and the action of the lower court in this case, and grant the Writ to reaffirm that the due process guarantees of Bouie apply to all judicial decisions wherein there is an unforeseeable judicial expansion of punitive provisions.

III.

This Court Should Resolve The Recurring Question Of Whether The Due Process Clause As Applied To Disbarment Proceedings Is Violated Wherein An Attorney Is Deprived Of His Or Her Right To Practice Law Through The Use Of Testimony Compelled Of That Attorney In A Separate Criminal Proceeding.

This Court should find that petitioners' Due Process rights are violated where the government may compel petitioners to testify in the criminal case of a third party by granting them immunity, and then that testimony and the cooperation given to the prosecuting agency are used in state disciplinary proceedings to deprive them of their license to practice law.

It is a matter of record in this case that both Heller and Morris were given a grant of immunity by the Government and that both cooperated with the Government, and that Mr. Morris was called to testify in the

Holzer trial. While the grant of immunity did not specifically include any prosecution by the Administrator for unethical conduct and Mr. Morris testified that he was aware of this at the time he testified at the Holzer trial, the procedure by which an attorney is granted immunity from criminal prosecution and therefore forced to testify, and his testimony is later used to remove his license to practice his profession is, in the view of respondents, a deprivation of a property right without due process in violation of the Constitution of the United States under the Fourteenth Amendment.

The Illinois Supreme Court has held that an attorney could be compelled to testify in a disciplinary proceeding if he is granted immunity from the use of his testimony at subsequent criminal proceedings. In

re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978). This is in accord with this Court's decision in Spevack v. Klein, 385 U.S. 511 (1967), and its progeny, holding that the protection against self-incrimination contained in the Fifth Amendment and as applied to the states through the Fourteenth Amendment is available to attorneys in disciplinary proceedings to the extent that the attorney's testimony would fall within that Amendment's protection, and that an attorney may not be deprived of this right by the threat of suspension or disbarment.

In March, the Court cited, with apparent approval, In re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434 U.S. 829, 98 S.Ct.110 (1977), in which the Seventh Circuit found that disciplinary proceedings were "remedial" rather than criminal and

held that, despite a grant of immunity from criminal prosecution which specifically purported to preclude the use of incriminating testimony at subsequent disciplinary proceedings, the "Fifth Amendment privilege against self-incrimination does not proscribe the introduction in state bar disciplinary proceedings of testimony compelled under a grant of immunity." Daley, 549 F.2d at 476-77.

Daley, limited in scope as it was to the question of whether the state Attorney Registration and Disciplinary Commission could be compelled to comply with the provisions of an immunity order which purported to disallow the use of the attorney's testimony in the state bar disciplinary proceedings, focused on the parameters of the Fifth Amendment protection. This left unresolved

the question of whether the entire process of compelling the testimony and later allowing the use of that testimony to disbar an attorney as occurred in the instant case, contravened the Fourteenth Amendment protection against the taking of property right without due process. The court in Daley did address a due process violation where the immunity protection actually afforded Daley was narrower in scope than that which he had been promised.

The decision of the court below violated petitioners rights under the Fourteenth Amendment by depriving them of a property right without due process. This Court should grant the Writ in the instant case to resolve the recurring questions

presented in Daley* and this case as to the extent to which the principles inherent in the Due Process Clause apply to disbarment proceedings wherein an attorney is deprived of his or her right to practice law through the use of testimony compelled of that attorney in a separate criminal proceeding.

CONCLUSION

Petitioners have been subjected to the ultimate professional sanction of disbarment - and thus, concurrently, the loss of their livelihoods - for conduct which was not clearly prohibited when it took place. The Supreme Court of Illinois, acting in its legislative capacity, was free to announce a new disciplinary rule or construction in Corboy, but was not free to apply that new

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*This Court denied certiorari in Daley. (434 U.S. 829 (1977))

rule or construction retroactively. The court itself recognized this constitutional privilege by not applying the new rule to the attorneys before it in Corboy, and yet it inexplicably applied the same to petitioners where their conduct also took place before pronouncement of the new rule. The decision of the court below directly implicates important questions under the Ex Post Facto and Due Process Clauses, which should be resolved by this Court. For the foregoing reasons, this Court should grant the Writ and accept this case for review.

Respectfully submitted,

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APPENDICES

APPENDIX A

Docket No. 66768—Agenda 16—September 1988.
In re MELVIN A. HELLER *et al.*, Attorneys, Respondents.

JUSTICE CLARK delivered the opinion of the court:

This matter is before the court upon exceptions of respondents, Melvin A. Heller and Jerrold L. Morris, to the reports of the Hearing Board and the Review Board recommending disbarment.

On September 5, 1986, the Administrator of the Attorney Registration and Disciplinary Commission filed with the Hearing Board a six-count complaint against respondents for their conduct in procuring for, assisting and/or facilitating Judge Reginald Holzer in obtaining at various times approximately $40,000. By reason of the conduct outlined in each of the counts, the complaint charges respondents with lending or giving a thing of value to a judicial officer in violation of Rule 7—110(a) of the Code of Professional Responsibility (Code) (107 Ill. 2d R. 7—110(a)); circumventing a disciplinary rule through the actions of another in violation of Rule 1—102(a)(2) of the Code (107 Ill. 2d R. 1—102(a)(2)); engaging in conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 1—102(a)(4) of the Code (107 Ill. 2d R. 1—102(a)(4)); engaging in actions prejudicial to the administration of justice in violation of Rule 1—102(a)(5) of the Code (107 Ill. 2d R. 1—102(a)(5)); engaging in actions that tend to bring the court and the legal profession into disrepute in violation of Supreme Court Rule 771 (107 Ill. 2d R. 771); and failing to avoid even the appearance of impropriety in violation of Canon 9 of the Code (107 Ill. 2d Canon 9).

Counts I through V of the Administrator's complaint, described in more detail below, involved five separate incidents of loans to or guarantees of loans for Judge Holzer from or by both Heller and Morris. Count VI involved an alleged payment from Heller to Holzer for assistance in securing admission into law school for Heller's son.

On February 24, 1987, a panel of the Hearing Board (panel) issued a report and recommendation in which it found by a "preponderance of the evidence" that both respondents were guilty of the misconduct charged in counts I through V of the Administrator's complaint but that the charges against Heller in count VI were not proven. The panel recommended disbarment. Respondents filed exceptions to the report with the Review Board.

On July 15, 1987, the Review Board filed an order remanding the case to the panel for such further proceedings as were deemed appropriate in order to review the evidence based upon a standard of *clear and convincing evidence* pursuant to Supreme Court Rule 753(c)(6) (107 Ill. 2d R. 753(c)(6)). The panel was further instructed to make individual findings, conclusions and recommendations as to each respondent.

On September 30, 1987, the panel, finding that further hearings were unwarranted, filed a revised report in which it found that the Administrator had proven by clear and convincing evidence that the respondents were guilty of the misconduct charged. The panel recommended disbarment. Respondents filed exceptions with the Review Board based on the revised report.

Respondents filed a brief and the case was orally argued before the Review Board. On January 13, 1988, the Review Board issued its report and recommendation in which it found that the panel had complied with the order of the remand. It also concurred with the findings of

fact and conclusions of law of the panel and recommended that respondents be disbarred.

On March 28, 1988, this court allowed respondents leave to file briefs and present oral argument. Respondents raise the following issues: whether the conclusion that Holzer extended favorable treatment to respondents in exchange for their arranging loans was established by clear and convincing evidence; whether the hearing panel's failure either to recuse itself or to conduct further proceedings upon remand was erroneous; whether respondents were properly judged separately in this consolidated case; and whether the recommendation of disbarment is warranted.

This case essentially does not raise any issues of fact. The statements of fact enunciated in the Administrator's complaint were virtually all admitted by the respondents in their answer.

Heller was admitted to the practice law in 1950, and Morris was admitted in 1952. In addition to being licensed attorneys, each is a licensed real estate broker. Both have continuously practiced law since being admitted to the bar and have worked together as partners since 1958. The primary area of concentration for their law firm has been in plaintiffs' personal injury work although they have also done work in real estate and family matters. In their practice together, respondents have divided responsibility for the firm's business. Heller has generally been responsible for the internal matters of the office; he would meet with clients during initial office visits and take care of most client contact. In addition, he would negotiate with insurance carriers or with the self-insured parties. Once it appeared that a case would go to trial rather than be settled at this preliminary stage, however, Morris would take over. Heller never handled the pretrial steps necessary to take a case to trial nor did he ever try a case for the firm. Morris' re-

sponsibilities thus centered in the litigation of cases; he handled the motions, discovery, trials, and supervision of associates working on cases.

During the early 1970's, the law division of the circuit court of Cook County permitted attorneys to pretry a block of cases before a judge who would agree to hear a certain attorney's or firm's cases. Morris, believing that this would allow the firm's cases to be settled or removed from the court call more quickly, approached Judge Holzer about taking on such a block assignment. In late 1971 or early January 1972, Judge Holzer agreed to preside over the Heller & Morris pretrial cases. At that time there were 24 cases transferred to Judge Holzer for pretrial.

In January 1972 Judge Holzer asked Morris to come to his chambers to discuss an urgent matter. During this meeting Holzer told Morris that he, Holzer, had financial problems and asked if Morris knew anyone who could help him out financially. Holzer indicated a need for from $5,000 to $10,000. Morris told Holzer that his own money was tied up but that he would see what he could do. Morris returned to his office and discussed the situation with his partner, Heller. Morris noted in his testimony that he expressed a concern to Heller that there could possibly be adverse consequences for their clients if they did not assist Holzer. Morris and Heller decided to arrange a loan to assist Holzer. Rather than give Judge Holzer a firm or a personal check from either of them, however, Morris contacted his uncle by marriage, William Sidell, and asked that he provide a check in the amount of $3,500 made payable to Judge Holzer. In order to protect Sidell from any potential loss, Morris and Heller indicated that they would immediately give Sidell the $3,500. Morris further indicated that any interest paid would go to Sidell and any repayment of the principal should be returned to Morris and Heller. Respond-

ents contributed equally to Sidell from a firm draw in exchange for Sidell's check to Holzer.

On January 20, 1972, Morris delivered Sidell's check to Holzer, who then delivered to Morris a promissory note at 7% interest due April 20, 1972. The note was payable to Sidell in the amount of $3,500. Morris returned to his office, had Sidell indorse the note, and deposited the note in the firm's safe. To date, no portion of the principal of the loan has been repaid.

In September 1973 Morris again asked Holzer to preside over more Heller & Morris cases for purposes of pretrial. Holzer agreed and approximately 11 cases were transferred to him for pretrial. Sometime that same month Holzer again called Morris to his chambers to discuss the possibility of Morris arranging another loan for between $10,000 and $15,000. Morris initially declined to assist Holzer, noting Holzer's failure to pay even the interest on the prior loan, let alone any of the principal. Holzer promised to pay the interest and subsequently gave Morris a personal check made payable to Sidell for the interest. Morris again discussed Holzer's request for assistance with his partner and both agreed to help Holzer. Morris again contacted Sidell and had him draw a check payable to Holzer, this time in the amount of $5,000. Holzer's interest check was delivered to Sidell and the same arrangements were entered into as for the first loan. Both Heller and Morris contributed equally to Sidell to insure that Sidell would not lose any funds should Holzer fail to repay. Morris delivered Sidell's check to Holzer, and Holzer delivered a promissory note payable to Sidell due May 1, 1974, at 8% interest. Holzer indicated that both loans would be repaid by the May 1 date. Morris again had Sidell indorse the back of the note, and he put the note in the safe along with the January 1972 note. To date Holzer has failed to repay any portion of the principal or interest on the $5,000 loan.

In late 1976 Morris and Holzer again met in the judge's chambers. Holzer indicated that he was continuing to experience financial difficulties and asked Morris to arrange another loan. Although Morris initially refused, Holzer persisted and asked Morris to contact Morris' bank, a Skokie bank, to see if arrangements could be made to extend Holzer a loan. Morris discussed Holzer's request with his partner, Heller, and both agreed to help the judge. Morris contacted the president of the Skokie Trust and Savings Bank, who agreed to give Holzer a loan of $15,000 if there was a guarantor for the obligation. Heller then made arrangements for a personal friend, a doctor, to guarantee the loan and extended an oral promise to the friend that should he be called upon to repay the loan that they, Heller and Morris, would pay the loan. Prior to this, Heller had never asked this friend to guarantee a loan for another person.

Also during this same time period, December 1976, Morris interceded with officers of American National Bank on Holzer's behalf regarding a debt owed to that bank. According to Morris, had he not interceded, Holzer was convinced that the bank would have forced him into bankruptcy proceedings.

Again in August 1978, Holzer contacted Morris to request his assistance in procuring a $10,000 loan from the Skokie bank. Heller and Morris discussed Holzer's request, and they again agreed to assist the judge. Morris called the Skokie bank president, who again agreed to make the loan if there was a guarantor. This time, however, rather than involving anyone else, Heller and Morris each gave their own personal guarantees to secure the obligation.

In December 1979, respondents again executed personal guarantees for a $10,000 loan to Holzer, though it is not clear from the record whether this was a renewal of the previous loan or whether this was an entirely new

loan.

The above-noted loans or guarantees, entered into during January 1972, September 1973, December 1976, August 1978, and December 1979, constitute the activities described in counts I through V of the Administrator's complaint against respondents. Count VI of the Administrator's complaint involved an alleged payment of $1,000 to Holzer by Heller for the purpose of assisting Heller's son gain admittance to law school. Even though Heller admitted the allegation in his answer to the complaint, the panel did not find sufficient evidence to establish a violation of the rules. The Administrator again raises count VI in his brief before this court; respondents argue that because the Administrator failed to file objections below he is now precluded from again arguing the charge. As our court has previously noted, a disciplinary proceeding before this court is in the nature of an original proceeding (*In re Harris* (1982), 93 Ill. 2d 285, 291) and the recommendations of the Hearing Board and the Review Board are advisory only (93 Ill. 2d at 292). However, because we find counts I through V sufficient to reach our decision, we need not herein address the allegation of count VI.

Before we begin our discussion of the issues presented by respondents, we note that respondents have admitted virtually all of the allegations contained in the Administrator's complaint. There is no dispute or question that respondents did arrange for or guarantee loans for Judge Holzer on the five dates noted above. Although there is some question as to the final total dollar amount of the loans (*i.e.*, whether the last two guarantees for $10,000 were for the same loan or were for additional advances) there is no question that respondents did assist Holzer by various means to obtain a substantial sum of money. Also, the record clearly indicates that between 1971 and 1979 respondents' firm appeared of

record before Judge Holzer in approximately 75 pending cases in the circuit court of Cook County. At no time during the pendency of the cases were adverse parties or their counsel advised of the relationship between Holzer and respondents.

In suggesting that it is necessary to question whether Holzer extended any favorable treatment to respondents, they insist that there was nothing to inform adverse parties about because they had shielded Holzer from knowledge of their personal involvement in the procurement of the loans. Respondents further argue that their only motive in so assisting Holzer was to help a friend in need. Morris and Holzer had met in law school, and although, according to respondent's testimony, they were not social friends, Morris indicated that they had a friendship "like members of a fraternity." We note, however, that Morris' own testimony belies this "friendship" tact. In discussing his own thoughts at the time of Holzer's original request for funds, Morris testified that the following went through his mind:

> "I can't loan him money. This is a concern, a fear I had. I can't loan him money. He's a judge. I come before him.
>
> Another concern. Well, if I don't loan him money, we have all these little clients. We have a big volume of personal people who are in the lower income bracket. *** And all these cases I never take changes of venue because there's too many of them. I would be fighting with my associates. So I have that policy.
>
> So, all this was in my head. *** I said, you know, like I know he would never hurt us but *how do I know for sure? I just couldn't believe he would. He's a judge. You never know.*" (Emphasis added.)

It is not necessary for a review of a possible Rule 7—110(a) (107 Ill. 2d R. 7—110(a)) violation to determine what Holzer, the judicial recipient, knew or thought about the loans arranged for him by respondents, that is, whether as a result of these loans he extended certain

favorable treatment to respondents or their clients. Clearly these loans do not fall within any of the exceptions of the Code of Judicial Conduct enumerated in Rule 65(C)(4) (107 Ill. 2d R. 65(C)(4)), a portion of which rule is now to be read in conjunction with Rule 7—110(a) (see *In re Corboy* (1988), 124 Ill. 2d 29). While the new Code of Judicial Conduct only became effective in January 1987, a judicial code has been in effect in Illinois since 1970. Even without the Judicial Code, which is not here in question, respondents were well aware, as evidenced by their own testimony, of the problems inherent in procuring a loan for a judge before whom they practiced. Were favors granted? Was favorable treatment extended to respondents? It is not necessary to answer these questions in the affirmative to find a violation of Rule 7—110(a). Indeed, we need not even address the question of the judge's state of mind; we need only note that by the respondents' own admissions, a thing of value was given to a judge in violation of Rule 7—110(a) (107 Ill. 2d R. 7—110(a)). Even under the new rule adopted in *Corboy*, respondents are not excused, as they had a continuing practice before Holzer. It is clear to this court also that, at the very least, Morris' motivation was partially grounded in a fear of possible negative repercussions, as evidenced by his own testimony. Morris and Heller had a volume personal injury business, one that each wanted to protect.

We turn now to a discussion of the remaining issues raised by respondents. Was it necessary for the hearing panel either to recuse itself or to conduct further hearings on remand? This court finds that neither was required.

When the initial report of the panel reached the Review Board, the Review Board recognized that in reaching a decision, the panel had used an improper standard of review. The case was remanded for individual findings

as to each respondent and for a determination based on the proper standard: clear and convincing evidence. The remand instructions to the panel were for "such further proceedings it may deem appropriate." The panel found that "additional proceedings are unwarranted" and issued a revised report again recommending disbarment. The Review Board determined that their remand order had been complied with and issued its own report agreeing with the panel and recommending disbarment.

Respondents argue that there is no indication that the panel ever considered the case under the proper standard: indeed, they allege that human nature would preclude the panel from recommending anything other than disbarment since that had been their original ruling. To support their contention that the panel did not reconsider the case, respondents point to certain technical details of presentation and certain errors in the findings.

Respondents allege that the panel's revised report was merely an exact duplicate of the original with the improper standard "whited-out" and then photocopied. While it appears that pages two through six of the original report were reused in their original form in the revised report, that alone does not indicate a failure on the part of the panel to reconsider the case under the proper standard. The original first page was replaced by two new pages: one and one-A; the original pages seven and eight were replaced by three new pages: seven, eight and nine. Although it may be difficult to understand in these days of sophisticated word processing programs why the report was reissued in such a manner, the mere repetition of prior stated material does not render a report tainted.

As to the "error" in the findings, respondents allege that discussion of count VI in relationship to Morris indicates an improper consideration of the case because Mor-

ris was not ever implicated in the activities alleged in that count. Only Heller had approached Holzer in regard to getting his son into law school. As our court discussed in *In re Mitan* (1979), 75 Ill. 2d 118, the Boards serve as agents of this court in administering the disciplinary functions. Due to the nature of the proceedings, it is not necessary to consider such "technical objections as to the practice and procedures." (75 Ill. 2d at 124.) Disciplinary proceedings are neither criminal nor civil in nature, but are *sui generis*, resulting from the court's inherent power over their officers. (*In re Mitan* (1987), 119 Ill. 2d 229, 246.) While the error regarding application of count VI to Morris may indicate some lack of care in preparing the report, it is not enough to conclude that the case was not properly considered. Moreover, as this court has already indicated, findings of the panel and the Review Board are advisory only. Consequently, neither of respondents' allegations regarding the proceedings before the panel warrant a new hearing before a new panel.

Respondents next ask whether they were properly judged separately in this case. We find that each was given adequate separate consideration. We note that the actions of both Heller and Morris were so intertwined and joint that consolidation of the case against each was appropriate. The findings of the Hearing and Review Boards were separate as to each respondent. To wholly separate Heller from Morris because the former did not ever go to court is to miss the unified nature of their actions. Both agreed to each of the transactions entered into, both contributed equally to the loans to Holzer described in the Administrator's complaint, counts I through V, both gave guarantees to the Skokie bank, both stood to gain by the actions undertaken. As stated earlier in this opinion, it is not necessary for us to find that a benefit was indeed received, only that the activities occurred. See *In re Corboy* (1988), 124 Ill. 2d 29.

Having found that there has indeed been a violation of the Code, Rules 7—110(a), 1—102(a)(2), 1—102(a)(4), 1—102(a)(5), of Supreme Court Rule 771 and of Canon 9, we now turn to the task of an appropriate sanction—which, as respondents readily noted in oral arguments before this court, is at the heart of respondents' exceptions to the Review Board's report. While this court gives the Board's recommendations due deference, we note that final responsibility for determining the appropriate sanction in attorney disciplinary cases rests with this court. (*In re Harris* (1982), 93 Ill. 2d 285, 291-92.) Each disciplinary case is unique and must be evaluated based on the particular set of facts presented. (*In re Leonard* (1976), 64 Ill. 2d 398, 404.) The purpose of discipline is not to punish the attorney, but to protect the public and to maintain the integrity of the judicial system. *In re Pappas* (1982), 92 Ill. 2d 243, 247.

We agree with the unanimous reports of both the Hearing and Review Boards that the appropriate sanction in this case is disbarment for each respondent. These respondents knowingly and repeatedly assisted a judge, a judge before whom their firm regularly practiced, with loans from individuals and from banks. While our court has only recently addressed the issue of loans or gifts to judges under Rule 7—110, as we noted in *In re Corboy* (1988), 124 Ill. 2d 29, "eleemosynary motives *** are irrelevant." (124 Ill. 2d at 39.) Our court has long held that evidence of dishonest intent and motive is not necessary to justify the imposition of discipline. (*In re Clayter* (1980), 78 Ill. 2d 276, 283; *In re Bloom* (1968), 39 Ill. 2d 250, 254.) Evidence showing lack of a dishonest intent is usually only appropriate to determine the nature and severity of the sanction imposed. *Clayter*, 78 Ill. 2d 276; *In re Thompson* (1963), 30 Ill. 2d 560.

While we note that many came forward to present evidence of the respondents' reputations for truth and

honesty, to present evidence of their many charitable activities, and to present evidence of the extent of their *pro bono* work, we do not find these sufficient to justify a lesser sanction. Respondents' reliance on cases from other jurisdictions is additionally not persuasive.–For a period of over eight years, respondents continued to practice before a judge whom they had repeatedly assisted with loans. Such flagrant and continuous disregard for the integrity of our legal system cannot be countenanced. This case is distinguishable from *In re Ketchum*, in which respondent and the judge in question were long time friends and where it was shown that respondent had a history of loaning money to the judge prior to his becoming a judge. (See *In re Ketchum* (1988), 124 Ill. 2d 50.) No such history was established in the instant case. Instead, the loans were procured contemporaneously with the respondents' request of the judge to handle some additional cases. It is therefore the order of this court that respondents be disbarred.

Respondents disbarred.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 30, 1989

Mr. David J. Walker
William J. Harte, Ltd.
111 W. Washington St., S#1100
Chicago, IL 60602

No. 66768 - In re: Melvin A. Heller and Jerrold L. Morris. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Calvo, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 9, 1989.

APPENDIX C

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
MELVIN A. HELLER,	)	
	)	
Respondent,	)	
	)	
No. 1181300,	)	
	)	Administrator's
and	)	No. 86 CH 202
	)	
JERROLD L. MORRIS,	)	
	)	
Respondent,	)	
	)	
No. 1963171	)	

REVISED
REPORT AND RECOMMENDATION

INTRODUCTION

Hearing was held in this matter on December 22, 1986 before Panel members Anthony J. Fornelli, Michael T. Caldwell and William R. Galliani, Chairman.

James J. Grogan and Naomi J. Woloshin

appeared as counsel on behalf of the Administrator. William J. Harte and David J. Walker appeared on behalf of the Respondent.

By its Order filed July 15, 1987, a majority of the Review Board remanded this matter to Panel II for such further proceedings the Panel deemed appropriate and to submit Findings, Conclusions and Recommendations based upon the standard set forth in Supreme Court Rule 753(c)(6).

Following deliberation, this Panel concludes additional proceedings are unwarranted and resolves that the individual factual involvements of each of the Respondents are so integrated and inextricable as to be indistinguishable and unsegregatable. The findings of Fact provided below portray the individual

activities of both Melvin A. Heller and Jerrold L. Morris as they are woven into the final tapestry of evidence presented before this Hearing Panel.

FINDINGS OF FACT

By their Answer to Administrator's Complaint, Respondents admitted to facts recited in the Complaint.

During the 1971 to 1979 era addressed by the Administrator's Complaint, Respondents were either partners or shareholders in the Chicago law firm of Heller & Morris & Associates, Ltd. The firm was primarily engaged in representation of personal injury claimants and litigants.

They equally shared management of the firm. Generally, Heller attended to client relations and negotiated with insurance companies on behalf of personal injury

clients. Morris attended to litigation, pleadings, discovery and supervision of firm associates. In the early 1970's, Heller processed about 650 personal injury claims a year which increased to about 1000 cases a year by the late 1970's when the firm was expanded to five-six attorneys.

While attending law school in Chicago between 1949 and 1952, Morris developed a warm, confident friendship with Reginald Holzer, a fellow law student. They confided to one another domestic problems, good and bad times and financial adversities. The friendship persisted after Holzer became a Circuit Judge in the 1960's and flowered in the 1970's.

In late 1971 or early January 1972, Morris approached Judge Reginald Holzer and asked him to preside at the pretrial

hearings of selected personal injury suits filed by his firm. He asked Holzer for this accomodation, sensing Holzer was the only judge he knew who would agree to allocate the time required to preside at the pretrial of about 24 cases. Holzer agreed with Morris to preside over the Heller and Morris pretrial cases.

About the same time that Judge Holzer agreed to preside at pretrial of Heller and Morris cases, the Judge phoned Morris and told him to come to his chambers to meet and discuss something of importance. At their meeting, the Judge and Morris chatted about Morris' family and his law practice. Holzer then confided to Morris that he was in dire need of $5,000 to $10,000, and asked Morris if he knew who could help him financially. After the meeting, Morris met with Heller

and divulged his conversation with Holzer. They mused on the personal friendship and possible adverse consequences if the loan was not effected. Morris and Heller then resolved to arrange for a loan to assist Holzer.

To that end, Morris contacted an uncle by marriage, and asked him to provide Heller and Morris with his check for $3,500 made payable to Judge Holzer. Morris told the uncle that they, in turn, would each contribute $1750.00 cash to him in consideration of the check, with the understanding the uncle would return any repayment ever made to him by Judge Holzer to Respondents.

Thereafter, Morris delivered the uncle's check to Judge Holzer. In return for the uncle's check, Holzer gave Morris a

$3500.00 promissory note dated January 20, 1972 and due April 20, 1972, bearing 7% interest, that was payable to Morris' uncle. Morris retained the note in Heller & Morris law office safe.

Holzer never repaid any portion of the principal of the $3500.00 loan. Heller and Morris have never made any attempt to collect the loan from Judge Holzer on behalf of the uncle.

On or about September 20, 1973, Holzer again summoned Morris to his chambers. They again exchanged civilities and confidences followed by Holzer reiterating his persisting financial woes. He then asked Morris to arrange another loan for between $10,000 and $15,000.

After the meeting, Morris discussed Holzer's request with Heller. Again, they

considered possible adverse consequences on their cases if the loan was not arranged, and resolved to orchestrate another loan for Holzer. On September 26, 1973, Morris again contacted his uncle and obtained another check from his uncle made payable to Holzer in the amount of $5000. Morris then gave his uncle $5000 cash, equally financed by Heller and Morris. The uncle's check was delivered to Judge Holzer in return for Holzer's $5000 note dated September 26, 1973, and made payable to the uncle. The second note was due May 1, 1974 at 8% interest. Subsequently, the uncle endorsed the back of the note and gave it to Morris, who deposited the $5000 note in Heller & Morris law office safe.

Holzer never repaid any portion of the principal or interest on the $5000 note nor

have Heller and Morris ever taken any action to collect the $5000 loan.

At or about the same time that the new $5000 loan was arranged by Morris for Holzer, he asked Judge Holzer to preside over eleven more Heller & Morris pretrial personal injury suits. Holzer agreed to the request.

In late 1976, Morris was summoned to another chambers meeting with Holzer. Holzer confided to Morris he continued suffering financial difficulties and asked Morris to arrange another loan with a bank with which Morris had prior business dealings. Morris assured Holzer he would contact the bank and endeavor to arrange another loan.

As in each previous loan transaction, Morris discussed this loan request with

Heller, whereupon they resolved to arrange another loan.

In December 1976, Morris contacted the bank president and negotiated a $15,000 loan for Holzer, for which Heller induced a physician friend to sign as guarantor of the loan. Heller assured the doctor that he and Morris would personally pay him $15,000 in the event he was called to pay the loan. Subsequently, the bank made the $15,000 loan to Holzer.

Sometime shortly prior to August 15, 1978, Holzer again summoned Morris to chambers. After exchanging civilities and confidences, Holzer informed him that his financial woes persisted. He asked Morris to arrange another $10,000 loan. Morris reviewed Holzer's new loan request with Heller.

On August 15, 1978, Heller and Morris personally executed a guarantee for the bank, and the bank extended a $10,000 loan to Holzer.

Again in December 1979, Heller and Morris executed another personal bank guarantee to facilitate a further loan to Holzer at the behest of Holzer.

In either 1974 or 1975, Heller approached Holzer for the purpose of enlisting Holzer's assistance in gaining his son's admission to a local Chicago law school. Holzer asked for $3,000 for costs involved. Heller gave Holzer $1,000 in cash on the judge's representation that he may arrange law school acceptance for the son.

Subsequently, Heller's son was admitted to another local Chicago law school, and when Heller asked Holzer for a return of the

$1000, the judge declined, explaining, cryptically, the money had been "used."

Ten lay and professional character witnesses appeared on behalf of the Respondents to uniformly testify to Respondents' flawless and unblemished community reputations for truth and honesty and Respondents' entitlement to these reputations for trust and confidence.

In the 1971-1979 era during which Heller and Morris arranged for various loans to Holzer totaling $44,500, the Respondents, or their associates, appeared of record in approximately 75 pending cases before Judge Holzer. This included motions, pretrials and trials which Heller and Morris arranged and scheduled before Holzer. At no time were adverse parties or their counsel advised of the loans Heller and Morris

arranged and guaranteed for Judge Holzer.

On May 5, 1985, an indictment was filed in the United States District Court for the Northern District of Illinois against Reginald Holzer. United States v. Holzer, 85 CR 287. In return for a grant of immunity, Respondents testified before federal grand jury, and during the Holzer criminal trial, Morris testified to loan payments and other financial benefits extended to Holzer by Heller and Morris.

Respondents urge that the record is devoid of any evidence that Holzer was ever informed that Respondents reimbursed anyone for loans made to Holzer, or had guaranteed any loans to Judge Holzer.

Respondents also urge that the record is devoid of evidence of favorable treatment by Judge Holzer toward Respondents or their

clients, or that favorable treatment was ever sought.

Lastly, we are urged to differentiate the conduct of Respondents since Heller never appeared in court, handled litigation, or conferred with Judge Holzer regarding loans. Conversely, Count VI of the Complaint relates to Heller's giving Holzer $1000 in return for arranging law school admission for his son in which Morris was in no manner implicated.

OPINION

Accepting that Judge Holzer was unaware that Respondents subsidized and guaranteed his loans, and assuming Judge Holzer's asuteness and perceptiveness actually did not alert him to their subsidies and guarantees, it cannot be honestly doubted he was aware that Respondents were procurers of

his loans.

It cannot be honestly doubted that Judge Holzer was comforted and relieved by the successive loans procured for him by Respondents.

It cannot be honestly doubted that the comfort and relief the loans provided to Judge Holzer were appreciated.

It cannot be honestly doubted that Judge Holzer's appreciation was not, on occasion, translated into some form of favored treatment toward some of the 75 matters which Respondents deliberately set for motions or scheduled for pretrial before Judge Holzer during the decade of the 1970's.

While we may believe that Judge Holzer's personal honor precluded any favored rulings or influence toward those

matters in which Respondents had interest that came before him, we must address other nexus issues.

Were Respondents' complicated, co. oluted and personally costly loan procurements on behalf of the Judge instigated by unabridged charity or the expectation of favored treatment on approximately 75 cases that Respondents arranged to be directed to Judge Holzer for motions, pretrials or trial?

Did Respondents conceal their financial relationships with Judge Holzer from their adversaries in the 75 matters to assure, as they testified, that Judge Holzer would not, inadvertently, discover their personal involvements in the loan arrangements?

Respondents have not attributed their admittedly unethical activities to

ignorance, physical, spiritual or mental impairment, or personal financial disaster.

In mitigation of their successive Holzer loan procurements and simultaneous scheduling of adversary matters before Holzer, during the decade of the 1970's, Respondents would characterize their activities as neither cynical, manipulative, calculated or opportunistic, but trivial and deserving only of censure.

It seems to us that the most striking contradiction of our profession is the fundamental reverence for honest and ethical behavior that we profess and the thorough-going disregard for honesty and ethics tolerated in practice.

The Judge repeatedly invited selected patrons to join in the seduction of professional integrity and compromise of

judicial independence. These Respondents repeatedly accepted the invitation.

Melvin A. Heller is an admitted accessory and collaborator with his law partner, Jerrold L. Morris, in providing perquisite loans that Judge Holzer solicited from his partner. Melvin Heller sanctioned, endorsed, approved and facilitated providing the perquisite loans. We believe Melvin Heller expected to share equally with his partner, Jerrold L. Morris, extraneous benefits of providing loans they facilitated for Judge Holzer.

Jerrold L. Morris is admitted procurer of perquisite loans directly solicited of him by Judge Holzer. He orchestrated and facilitated the loans in concert with his partner, Melvin A. Heller. We believe Jerrold L. Morris expected to share equally

with his partner, Melvin A. Heller, extraneous benefits of providing loans solicited by Judge Holzer.

Respondents' activities severely contributed to public contempt and disdain of the legal profession, as well as the judiciary, and precipitated the people's crippled confidence and faith in their legal system.

CONCLUSIONS AS TO MELVIN A. HELLER

That the Administrator has proven by clear and convincing evidence each of the following charges recited in Counts I, II, III, IV and V of the Administrator's Complaint charged to Melvin A. Heller:

a) violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in actions prejudicial to the

administration of justice;

b) violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

c) violated Rule 1-102(a)(2) of the Illinois Code of Professional Responsibility by circumventing a disciplinary rule through the actions of another;

d) violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceipt and misrepresentation;

e) failed to avoid even the appearance of an impropriety in violation of

Canon Nine of the Illinois Code of Professional Responsibility; and

f) violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

That the administrator has not proven by clear and convincing evidence the charges against Melvin A. Heller recited in Count VI of his Complaint.

CONCLUSIONS AS TO JERROLD L. MORRIS

That the Administrator has proven by clear and convincing evidence each of the following charges recited in Counts I, II, III, IV and V of the Administrator's Complaint charged to Jerold L. Morris:

a) violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in

actions prejudicial to the administration of justice;

b) violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

c) violated Rule 1-102(a)(2) of the Illinois Code of Professional Responsibility by circumventing a disciplinary rule through the actions of another;

d) violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation;

e) failed to avoid even the appearance

of an impropriety in violation of Canon Nine of the Illinois Code of Professional Responsibility; and

f) violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

That the Administrator has not proven by clear and convincing evidence the charges against Jerrold L. Morris recited in Count VI of his Complaint.

RECOMMENDATIONS AS TO MELVIN A. HELLER

That he be disbarred and he be taxed equally with Co-Respondent Jerrold L. Morris, for all costs incurred by the Administrator in these proceedings.

RECOMMENDATIONS AS TO JERROLD L. MORRIS

That he be disbarred and he be taxed equally with his Co-Respondent Melvin A.

Heller for all costs incurred by the Administrator in these proceedings.

FOR HEARING PANEL II

_____

Chairman

APPENDIX D

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
MELVIN A. HELLER, No. 1181300,	)	
	)	Administrator's
and	)	No. 86 CH 202
	)	
JERROLD L. MORRIS, No. 1963171,	)	
	)	
Attorney-Respondents	)	

REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

The Review Board finds that the Hearing Board complied with the Review Board's order of remand entered on July 15, 1987.

After full consideration and review of all matters of record, the Review Board concurs with the findings of fact and conclusions of law of the Hearing Board and

recommends that Respondents, Melvin A. Heller and Jerrold L. Morris, be disbarred.

The revised Report and Recommendation of the Hearing Board is attached.

Respectfully submitted,

Herbert J. Bell
Michel A. Coccia
C. William Fechtig
Watts C. Johnson
John C. Menk

Members, Review Board

Member Martin L. Silverman recused himself in this matter.

Members Chester L. Blair and Marshall A. Susler did not participate.

This matter decided January 8, 1988.

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
MELVIN A. HELLER,	)	
	)	
Respondent,	)	
	)	
No. 1181300.	)	
	)	Administrator's
and	)	No. 86 CH 202
	)	
JERROLD L. MORRIS,	)	
	)	
Respondent,	)	
	)	
No. 1963171	)	

REVISED
REPORT AND RECOMMENDATION

INTRODUCTION

Hearing was held in this matter on December 22, 1986 before Panel members Anthony J. Fornelli, Michael T. Caldwell and William R. Galliani, Chairman.

James J. Grogan and Naomi J. Wolshin appeared as counsel on behalf of the Respondent.

By its Order filed July 15, 1987, a majority of the Review Board remanded this matter to Panel II for such further proceedings the Panel deemed appropriate and to submit Findings, Conclusions and Recommendations based upon the standard set forth in Supreme Court Rule 753(c)(6).

Following deliberation, this Panel concludes additional proceedings are unwarranted and resolves that the individual factual involvements of each of the Respondents are so integrated and inextricable as to be indistinguishable and unsegregatable. The Findings of Fact provided below portray the individual activities of both Melvin A. Heller and

Jerrold L. Morris as they are woven into the final tapestry of evidence presented before this Hearing Panel.

FINDINGS OF FACT

By their Answer to Administrator's Complaint, Respondents admitted to facts recited in the Complaint.

During the 1971 to 1979 era addressed by the Administrator's Complaint, Respondents were either partners or shareholders in the Chicago law firm of Heller & Morris & Associates, Ltd. The firm was primarily engaged in representation of personal injury claimants and litigants.

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and divulged his conversation with Holzer. They mused on the personal friendship and possible adverse consequences if the loan was not effected. Morris and Heller then resolved to arrange for a loan to assist Holzer.

To that end, Morris contacted an uncle by marriage, and asked him to provide Heller and Morris with his check for $3,500 made payable to Judge Holzer. Morris told the uncle that they, in turn, would each contribute $1750.00 cash to him in consideration of the check, with the understanding the uncle would return any repayment ever made to him by Judge Holzer to Respondents.

Thereafter, Morris delivered the uncle's check to Judge Holzer. In return for the uncle's check, Holzer gave Morris a

$3500.00 promissory note dated January 20, 1972 and due April 20, 1972, bearing 7% interest, that was payable to Morris' uncle. Morris retained the note in Heller & Morris law office safe.

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Heller, whereupon they resolved to arrange another loan.

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Subsequently, Heller's son was admitted to another local Chicago law school, and when Heller asked Holzer for a return of the

$1000, the judge declined, explaining, cryptically, the money had been "used."

Ten lay and professional character witnesses appeared on behalf of the Respondents to uniformly testify to Respondents' flawless and unblemished community reputations for truth and honesty and Respondents' entitlement to these reputations for trust and confidence.

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Respondents also urge that the record is devoid of evidence of favorable treatment by Judge Holzer toward Respondents or their

clients, or that favorable treatment was ever sought.

Lastly, we are urged to differentiate the conduct of Respondents since Heller never appeared in court, handled litigation, or conferred with Judge Holzer regarding loans. Conversely, Count VI of the Complaint relates to Heller's giving Holzer $1000 in return for arranging law school admission for his son in which Morris was in no manner implicated.

OPINION

Accepting that Judge Holzer was unaware that Respondents subsidized and guaranteed his loans, and assuming Judge Holzer's asuteness and perceptiveness actually did not alert him to their subsidies and guarantees, it cannot be honestly doubted he was aware that Respondents were procurers of

his loans.

It cannot be honestly doubted that Judge Holzer was comforted and relieved by the successive loans procured for him by Respondents.

It cannot be honestly doubted that the comfort and relief the loans provided to Judge Holzer were appreciated.

It cannot be honestly doubted that Judge Holzer's appreciation was not, on occasion, translated into some form of favored treatment toward some of the 75 matters which Respondents deliberately set for motions or scheduled for pretrial before Judge Holzer during the decade of the 1970's.

While we may believe that Judge Holzer's personal honor precluded any favored rulings or influence toward those

matters in which Respondents had interest that came before him, we must address other nexus issues.

Were Respondents' complicated, convoluted and personally costly loan procurements on behalf of the Judge instigated by unabridged charity or the expectation of favored treatment on approximately 75 cases that Respondents arranged to be directed to Judge Holzer for motions, pretrials or trial?

Did Respondents conceal their financial relationships with Judge Holzer from their adversaries in the 75 matters to assure, as they testified, that Judge Holzer would not, inadvertently, discover their personal involvements in the loan arrangements?

Respondents have not attributed their admittedly unethical activities to

ignorance, physical, spiritual or mental impairment, or personal financial disaster.

In mitigation of their successive Holzer loan procurements and simultaneous scheduling of adversary matters before Holzer, during the decade of the 1970's, Respondents would characterize their activities as neither cynical, manipulative, calculated or opportunistic, but trivial and deserving only of censure.

It seems to us that the most striking contradiction of our profession is the fundamental reverence for honest and ethical behavior that we profess and the thorough-going disregard for honesty and ethics tolerated in practice.

The Judge repeatedly invited selected patrons to join in the seduction of professional integrity and compromise of

judicial independence. These Respondents repeatedly accepted the invitation.

Melvin A. Heller is an admitted accessory and collaborator with his law partner, Jerrold L. Morris, in providing perquisite loans that Judge Holzer solicited from his partner. Melvin Heller sanctioned, endorsed, approved and facilitated providing the perquisite loans. We believe Melvin Heller expected to share equally with his partner, Jerrold L. Morris, extraneous benefits of providing loans they facilitated for Judge Holzer.

Jerrold L. Morris is admitted procurer of perquisite loans directly solicited of him by Judge Holzer. He orchestrated and facilitated the loans in concert with his partner, Melvin A. Heller. We believe Jerrold L. Morris expected to share equally

with his partner, Melvin A. Heller, extraneous benefits of providing loans solicited by Judge Holzer.

Respondents' activities severely contributed to public contempt and disdain of the legal profession, as well as the judiciary, and precipitated the people's crippled confidence and faith in their legal system.

CONCLUSIONS AS TO MELVIN A. HELLER

That the Administrator has proven by clear and convincing evidence each of the following charges recited in Counts I, II, III, IV and V of the Administrator's Complaint charged to Melvin A. Heller:

a) violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in actions prejudicial to the

administration of justice;

b) violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

c) violated Rule 1-102(a)(2) of the Illinois Code of Professional Responsibility by circumventing a disciplinary rule through the actions of another;

d) violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceipt and misrepresentation;

e) failed to avoid even the appearance of an impropriety in violation of

Canon Nine of the Illinois Code of Professional Responsibility; and

f) violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

That the administrator has not proven by clear and convincing evidence the charges against Melvin A. Heller recited in Count VI of his Complaint.

CONCLUSIONS AS TO JERROLD L. MORRIS

That the Administrator has proven by clear and convincing evidence each of the following charges recited in Counts I, II, III, IV and V of the Administrator's Complaint charged to Jerold L. Morris:

a) violated Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility by engaging in

actions prejudicial to the administration of justice;

b) violated Rule 7-110(a) of the Illinois Code of Professional Responsibility by lending or giving a thing of value to a judicial officer;

c) violated Rule 1-102(a)(2) of the Illinois Code of Professional Responsibility by circumventing a disciplinary rule through the actions of another;

d) violated Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation;

e) failed to avoid even the appearance

of an impropriety in violation of Canon Nine of the Illinois Code of Professional Responsibility; and

f) violated Supreme Court Rule 771 by engaging in actions that tend to bring the Court and legal profession into disrepute.

That the Administrator has not proven by clear and convincing evidence the charges against Jerrold L. Morris recited in Count VI of his Complaint.

RECOMMENDATIONS AS TO MELVIN A. HELLER

That he be disbarred and he be taxed equally with Co-Respondent Jerrold L. Morris, for all costs incurred by the Administrator in these proceedings.

RECOMMENDATIONS AS TO JERROLD L. MORRIS

That he be disbarred and he be taxed equally with his Co-Respondent Melvin A.

Heller for all costs incurred by the Administrator in these proceedings.

FOR HEARING PANEL II

_____

Chairman

APPENDIX E

SUPREME COURT OF THE UNITED STATES
No. A-845

Melvin A. Heller and Jerrold L. Morris,
Petitioner

v.

Illinois Attorney Registration and
Disciplinary Commission

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 30, 1989.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 24
day of April, 1989.

No. 88-1959

JUL 5 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN A. HELLER and JERROLD L. MORRIS,

Petitioners,

vs.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether Petitioners failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3).

II. Whether procedures employed by the Supreme Court of Illinois imposing discipline on Petitioners for their repeated violations of long-established ethical principles violated the Due Process requirement of the Fourteenth Amendment.

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No. 88-1959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MELVIN A. HELLER & JERROLD L. MORRIS

Petitioners,

vs.

ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

Nor shall any State deprive any person of life, liberty, or property, without due process of law; U.S. CONST. amend. XIV.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 U.S.C. § 1257.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

Supreme Court Rule 753(c)(6). Inquiry, Hearing, and Review Boards. Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

Supreme Court Rule 771. Types of Discipline.

(a) disbarment;
(b) disbarment of consent;

(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation; or
(g) censure.

STATEMENT OF THE CASE

On September 5, 1986 the Administrator of the Attorney Registration and Disciplinary Commission filed a six count complaint against Petitioners pursuant to Illinois Supreme Court Rule 753. The complaint charged Petitioners with engaging in actions prejudicial to the administration of justice; lending or giving a thing of value to a judicial officer; circumventing a disciplinary rule through the actions of another; engaging in conduct involving

dishonesty, fraud, deceit and misrepresentation; failing to avoid even the appearance of impropriety; and engaging in actions that tend to bring the Court and legal profession into disrepute. Counts I-V alleged that Petitioners made, guaranteed or facilitated in loans to Judge Reginald Holzer. Count VI alleged that Petitioner Heller paid Judge Holzer to assist Heller's son in gaining admission into a local law school.

On February 24, 1987, a panel of the Hearing Board issued a report and recommendation finding that Petitioners were guilty by a preponderance of the evidence of the misconduct alleged in Counts I, II, III, IV and V of the Administrator's complaint. The Hearing Panel found that the misconduct alleged in Count

VI had not been proven. The Hearing Board recommended disbarment for both Petitioners. On March 19, 1987, Petitioners filed exceptions to the report and recommendation of the Hearing Board.

On July 15, 1987, the Review Board remanded the case to the hearing panel for such further proceedings as the panel deemed appropriate and to submit findings, conclusions and recommendations based upon a standard of clear and convincing evidence as set forth in Illinois Supreme Court Rule 753(c)(6). Further, the Review Board directed the Hearing Panel to make individual findings, conclusions and recommendations as to each Petitioner.

On September 30, 1987, the Hearing Panel issued its revised

report and recommendations, after finding that additional proceedings were unwarranted. The Hearing Board concluded that the Administrator had proven by clear and convincing evidence that the Petitioners were guilty of the misconduct charged in the Administrator's complaint. The panel recommended disbarment. The Petitioners filed exceptions to the revised report of the Hearing Board.

On January 13, 1988, the Review Board issued its report and recommendation finding that the Hearing Board complied with its order of remand. The Review Board further concurred with the finding of fact and conclusions of law of the Hearing Panel and recommended that Petitioners be disbarred. The Petitioners filed exceptions to the report of the Review Board with the

Supreme Court of Illinois.

On December 6, 1988, after considering briefs and oral arguments, the Supreme Court of Illinois issued an order disbarring Petitioners from the practice of law.

On December 27, 1988, Petitioners filed a Petition for Rehearing with the Supreme Court of Illinois, raising a federal question for the first time. On January 30, 1989, the Supreme Court of Illinois denied the petition without ruling on the federal question. (Pet.App. 14).

On February 2, 1989, Petitioners filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit Petitioners to seek review in the Supreme Court of the United States. On February 7, 1989, the Supreme Court of Illinois issued an

order staying the mandate.

On May 30, 1989, Petitioners served Respondent with copies of their Petition for Writ of Certiorari to the Supreme Court of the United States.

On June 26, 1989 Petitioners filed a Motion to File an Amended Petition for Writ of Certiorari. In their Amended Petition, Petitioners raise certain issues discussed below.

SUMMARY OF ARGUMENT

The Amended Petition of Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioners failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). Petitioners did not raise any federal

constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioners have not demonstrated that they fit within any exception as they had reason to expect that the Court would decide the case as it did.

Second, Petitioners were not denied due process of law during the course of the disciplinary proceedings against them, nor have petitioners been deprived of a property right. A license to practice law is a privilege not an absolute right. Licensing of attorneys in Illinois is within the inherent authority of the Supreme Court of Illinois. A grant of immunity in exchange for testimony in a federal prosecution protects petitioners from criminal

proceedings, but does not extend to disciplinary proceedings. The two proceedings are clearly separate and distinctive. Petitioners received notice of the charges and an opportunity to defend in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONERS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3).

Petitioners are required to demonstrate in their petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioners have failed to do so.

Petitioners first raised their federal constitutional claim of a denial of due process in their

petition for rehearing after the judgment of the Supreme Court of Illinois.

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient to invoke federal jurisdiction unless the court actually entertains the petition and expressly decides the question. Consolidated Turnpike Co. v. Norfolk and Ocean View Railway Co., 228 U.S. 326, 334 (1913). As the Illinois Supreme Court denied the petition in the instant case without entertaining the federal question (Pet.App. B), the general rule precludes review by this Court. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory

recitation that the petition has been fully or maturely considered and is accordingly denied. Consolidated Turnpike Co. v. Norfolk and Ocean View Railroad Co., 228 U.S. 326, 333-334 (1913).

In order to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioners must establish that their case fits within an exception. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). Petitioners have not set forth any claim nor authority asserting that they fit within an exception. The only exception Petitioners could possibly claim is that the Illinois Supreme Court rendered an unexpected decision, giving them no prior

opportunity to anticipate or assert their federal claim, and the petition for rehearing constitutes their first and only chance to present the matter to that court. Brinkerhoff-Farris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930); Missouri Insurance Co. v. Gehner, 281 U.S. 313, 320 (1930). Petitioners clearly fail to meet this test. First, Illinois Supreme Court Rule 771 provides for types of discipline that may be imposed for professional misconduct, including disbarment. Second, the Administrator has urged disbarment throughout the course of the disciplinary proceeding, and the Hearing Board and Review Board have recommended disbarment. (Pet.App. C, D). Thus, Petitioners cannot assert that the Court's decision was unexpected or a surprise.

II. THE PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONERS FOR THEIR REPEATED VIOLATIONS LONG-ESTABLISHED ETHICAL PRINCIPLES VIOLATED THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT.

Petitioners erroneously contend that the procedure by which an attorney is granted immunity from criminal prosecution is a deprivation of a property right, i.e. his law license, without due process. Petitioners specious argument fails for several reasons. First, Petitioners base their argument on the fallacious premise that a law license is a property right. It is well established that the right to practice law is a privilege. In re Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954). Membership in the legal profession and engaging in the practice of law is a privilege and

not an absolute right (People ex rel. Chicago Bar Ass'n v. Baker, 311 Ill. 66, 142 N.E.2d 554, 31 A.L.R. 737), and no attorney will be permitted to engage in the conduct of his profession in such a manner as to bring the same into disrepute. In re Donaghy, 402 Ill.120, 83 N.E.2d 560, 562 (1948).

Lawyer discipline is within the inherent authority of the state courts. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Petitioners' law licenses, like those of all other Illinois attorneys', are a privilege granted by the Supreme Court of Illinois to persons deemed to be fit to practice law. Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of Illinois. See In re Neff, 83 Ill.2d 20, 413 N.E.2d

1282, 1284 (1980). With regard to Petitioners' misconduct, the Court stated that "for a period of over eight years, petitioners continued to practice before a judge whom they had repeatedly assisted with loans. Such flagrant and continuous disregard for the integrity of our legal system cannot be countenanced." In re Heller, 126 Ill.2d 94, 533 N.E.2d 824, 830 (1988). For these reasons, Petitioners lost their privilege to practice law. (emphasis supplied). Thus, Petitioners' argument is baseless because Petitioners never had a property right of which they could be deprived.

Even if, arguendo, a law license could be considered a property right, Petitioners' argument is without merit. Petitioners cite Spevak v. Klein, 385 U.S. 511 (1967) for the

proposition that an attorney cannot be deprived of his right against self-incrimination by the threat of suspension or disbarment. This proposition is not applicable to the instant case. Petitioners state throughout their brief that Morris was aware at the time he testified in the federal prosecution of Holzer that his grant of immunity did not extend to any prosecution by the Attorney Registration and Disciplinary Commission for unethical conduct. (Pet.Br. 16, 28). Petitioners were disbarred for their reprehensible conduct, not for refusing to cooperate in their disciplinary proceeding. Furthermore, as Petitioners point out in their brief, they cooperated with the Attorney Registration and Disciplinary Commission in their

disciplinary proceeding. At no time during this proceeding did Petitioners assert any claim of their Fifth Amendment rights to protection against self-incrimination or allege a violation of due process.

The authority cited by Petitioners in their brief wholly supports the Administrator's position. In re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978) and In re Daley, 59 F.2d 469 (7th Cir. 1977) both establish that a clear distinction exists between disciplinary proceedings and criminal proceedings. While a grant of immunity is a protection against subsequent criminal proceedings, it is inapposite to attorney disciplinary proceedings. The essence of criminal proceedings is "intended to a redress criminal

wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines," while the function of disciplinary proceedings is to determine whether an attorney "retains the attribute of moral fitness which is requisite to the fulfillment of an attorney's responsibilities to the court which licensed him, as well as to the public." 549 F.2d at 475. A review of these cases clearly establishes that Petitioners' Fourteenth Amendment due process rights were not violated.

In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both

requirements have been met. Petitioners had notice that they were charged with making numerous proscribed loans to a judge. They were afforded ample opportunity to defend the charges and they did so in a vigorous manner.

In addition, Supreme Court Rule 771 provides Petitioners with sufficient notice that the state court had the authority to impose discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. The Hearing Board and Review Board recommended disbarment and the Illinois Supreme Court ultimately agreed. Thus, no substantial federal question exists.

In summary, Petitioners' argument is totally devoid of legal authority. As a matter of law, a

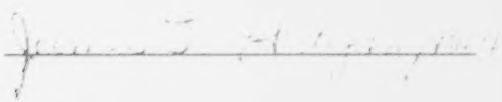
license to practice law is a privilege, not a right. A grant of immunity includes only criminal proceedings, not attorney disciplinary proceedings. The procedure employed, which resulted in the disbarment of Petitioners, is not violative of the Fourteenth Amendment, but "necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice." See Middlesex County Ethics Committee, etc. v. Garden State Bar Association, et. al., 457 U.S. 423, 434-35 (1982). Petitioners speciously assert that this Court should resolve certain questions under the Due Process Clause. A review of the applicable case law clearly establishes that such questions have already been

resolved. Petitioners sole purpose underlying this petition is to delay the issuance of the mandate of the Supreme Court of Illinois disbarring Petitioners.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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